

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0144-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL ALLISON,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause No. CR2004-039

Honorable Monica Stauffer, Judge

REVIEW GRANTED; RELIEF DENIED

Derek D. Rapier, Greenlee County Attorney
By Michael McCarthy

Clifton
Attorneys for Respondent

Michael Allison

Florence
In Propria Persona

E S P I N O S A, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Michael Allison was convicted of attempted child molestation of his then four-year-old niece, a class three felony and a dangerous crime against children. According to the terms of the plea agreement, Allison agreed that the trial court would determine any aggravating factors used to enhance his sentence and that, in so doing, the parties would “not [be] bound by the rules of evidence.” After finding three aggravating factors and one mitigating factor, the court imposed an aggravated prison term of twelve years, a sentence within the eight-to-twelve-year range set forth in the plea agreement.

¶2 In November 2004, just after he was sentenced, Allison filed his first notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Allison’s attorney notified the trial court that he had been unable to find “any viable claims upon which to seek post-conviction relief” and asked that Allison be given the opportunity to file a pro se petition, a request the court granted. In July 2005, after Allison failed to file a brief in the allotted time, the court dismissed the Rule 32 proceeding. The court subsequently granted counsel’s request to give Allison an additional forty-five-day extension to file a pro se petition. However, in November 2005, after Allison had still not filed a petition, the court again dismissed the Rule 32 proceeding.

¶3 In March 2009, more than three years after the trial court had dismissed his first Rule 32 proceeding, Allison filed a second notice and petition for post-conviction relief, in propria persona. Notably, in his 2009 notice of post-conviction relief, Allison indicated that

it was his first Rule 32 proceeding and that his claim was not being filed pursuant to Rule 32.1(d), (e), (f), (g), or (h). Instead, it appears he attempted to explain the untimely filing of his notice, filed well beyond the time restrictions set forth in Rule 32.4(a), as follows:

The sentence imposed was illegal because the Court improperly considered sentencing factors in aggravation[, t]hereby completely discounting the one mitigating factor found by the Court. While it is true that Petitioner waived various issues concerning factual determinations by the Court, it is equally true that Petitioner did not waive issues regarding the legality of the sentence imposed. In addition, a long line of Arizona cases hold[s] that an illegal sentence may be corrected at any time, so timeliness vel non is not a bar to this petition.

¶4 In April 2009, the trial court dismissed Allison's petition, finding his claim precluded as untimely and, in any event, that it was without merit. This petition for review followed. Allison now argues, as he did below, that his sentence is illegal because the trial court relied on improper aggravating factors. We will not disturb a trial court's denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶5 Because Allison waived his claim by failing to raise it in his previous Rule 32 proceeding, the trial court correctly found it precluded and properly dismissed the petition. *See* Ariz. R. Crim. P. 32.2(a)(3). Nothing in the petition for review establishes that Rule 32.2 is inapplicable or that Allison should be excused from its preclusive effect on any of the grounds within the exceptions set forth in Rule 32.2(b). Nor has Allison raised a claim of

sufficient constitutional magnitude requiring a personal waiver to avoid preclusion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007).

¶6 Accordingly, because we conclude the trial court did not abuse its discretion by dismissing Allison’s petition for post-conviction relief as precluded, we grant review but deny relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge